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Nos. 94-558 and 94-627

In the Supreme Court of the United States

UNITED STATES OF AMERICA, APPELLANT

v.

RAY HAYS, ET AL.

STATE OF LOUISIANA, ET AL., APPELLANTS

v.

RAY HAYS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

REPLY BRIEF FOR THE UNITED STATES

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OCTOBER TERM, 1994

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1. We argue in our opening brief (Br. 14-20) that the district court erred in holding that "[r]ace-conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." J.S. App. 5a. While agreeing that race-conscious redistricting is not always subject to strict scrutiny, Br. 23-24, appellees nevertheless advocate a very

similar standard. Relying on *Village of Arlington Heights* v. *Metropolitan Housing. Dev. Corp.*, 429 U.S. 252, 266 (1977), appellees contend (Br. 19-20) that strict scrutiny is appropriate any time that race is "a motivating factor" in determining a district's boundaries.

As we have discussed in our opening brief (Br. 15-20), redistricting presents a unique setting for applying the Equal Protection Clause. In redistricting, States must reconcile the competing claims to political influence of different politically cohesive groups. Members of a racial minority often form such a competing group. If a State's intent to draw district lines to accommodate the interests of a politically cohesive racial minority always triggered strict scrutiny—while accommodating the interests of other politically cohesive groups did not—it would put racial minority groups at a severe competitive disadvantage in the redistricting process. Far from furthering equal protection goals, application of strict scrutiny whenever redistricting accommodates the political interests of racial minorities would seriously undermine those goals.*

* The other cases relied upon by appellees do not support their view that strict scrutiny applies to any district created with race as a motivating factor. In *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), the municipal lines were bizarre and had the effect of depriving blacks of the right to vote in municipal elections. The claim at issue in *Wright* v. *Rockefeller*, 376 U.S. 52, 53-54 (1964) was that the district lines were irrational and had the effect of reducing the political power of a racial minority group. Appellees' assertion that, following this Court's decision in *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993), all of the district courts have held that strict scrutiny applies to any district created with race as a motivating factor is also incorrect. Besides the district court in this case, only one other

Application of appellees' proposed approach would also cause a dramatic increase in the number of redistricting plans subject to strict scrutiny. Guided by political considerations, a sense of fairness, or a desire to comply with the Voting Rights Act, jurisdictions at all levels of government often create majority-minority districts. Appellees' proposed approach would subject all those districts to strict scrutiny.

Appellees attempt to minimize the practical consequences of their position by claiming that in this case, the North Carolina case, and the Georgia case, strict scrutiny "was applied to only one district," and that "[e]ven in Texas, only three of that State's thirty districts were subjected to strict scrutiny." Br. 25 & n.4. That claim is misleading.

In this case, the district court applied strict scrutiny to only one Louisiana district. But that is only because the district court concluded that appellees did not challenge the majority-minority district in New Orleans. J.S. App. 41a. Had that

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district court has adopted that standard. See *Shaw* v. *Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994), juris. statements filed, Nos. 94-923 & 94-924 (Nov. 21, 1994). The other three district courts have rejected that standard. See *Johnson* v. *Miller*, 864 F. Supp. 1354, 1371-1374 (S.D. Ga. 1994) (strict scrutiny applies when race is the overriding factor in the creation of a district), prob. juris. noted, 115 S. Ct. 713 (1995) (Nos. 94-631, 94-797 & 94-929); *Vera* v. *Richards*, 861 F. Supp. 1304, 1344-1345 (S.D. Tex. 1994) (strict scrutiny applies only to districts that reflect an extraordinary departure from the State's traditional redistricting practices), juris. statements filed, Nos. 94-805 (Oct. 31, 1994), 94-806 (Nov. 2, 1994) & 94-988 (Dec. 1, 1994); *DeWitt* v. *Wilson*, 856 F. Supp. 1409, 1411-1413 (E.D. Cal. 1994) (strict scrutiny applies only to dramatically irregular districts), juris. statement filed, No. 94-275 (Aug. 8, 1994).

district been challenged, it would have been subject to strict scrutiny under appellees' motivating factor approach. In North Carolina, both majority-minority districts were subjected to strict scrutiny by the district court, not just one. *Shaw* v. *Hunt*, 861 F. Supp. 408, 473-474 (E.D.N.C. 1994), juris. statements filed, Nos. 94-923 & 94-924 (Nov. 21, 1994). In Georgia, only one of the three majority-minority districts was subjected to strict scrutiny, but that is because the plaintiffs in that litigation challenged only one of the three districts. *Johnson* v. *Miller*, 864 F. Supp. 1354, 1359 (S.D. Ga. 1994), prob. juris. noted, 115 S. Ct. 713 (1995) (Nos. 94-631, 94-797 & 94-929). Had plaintiffs challenged all three districts, and had the court applied appellees' proposed test, all three majority-minority districts would have been subjected to strict scrutiny. *Id.* at 1366-1377.

In Texas, it is true that only three of the State's congressional districts were subjected to strict scrutiny. *Vera* v. *Richards*, 861 F. Supp. 1304, 1337-1344 (S.D. Tex. 1994), juris. statements filed, Nos. 94-805 (Oct. 31, 1994), 94-806 (Nov. 2, 1994) & 94-988 (Dec. 1, 1994). The court expressly found, however, that race was a motivating factor in 16 additional districts challenged by the plaintiffs in that case. *Id.* at 1325-1328. The court failed to subject those districts to strict scrutiny only because it limited strict scrutiny to districts that, in its view, reflected an extraordinary departure from the State's traditional redistricting practices. *Id.* at 1344-1345. Appellees also do not discuss the California case. There, the State's redistricting plans for Congress, state Assembly, and state Senate "attempted to reasonably accommodate the interests of every 'functionally, geographically compact' minority group

of sufficient voting strength to constitute a majority in a single-member district." *DeWitt* v. *Wilson*, 856 F. Supp. 1409, 1411 (E.D. Cal. 1994), juris. statement filed, No. 94-275 (Aug. 8, 1994). Had the court applied appellees' proposed standard in that case, it would have subjected virtually all of the 54 majority-minority legislative districts (14 congressional, 27 state Assembly, 13 state Senate) to strict scrutiny. See *Wilson* v. *Eu*, 823 P.2d 545, 580-596 (Cal. 1992). Because the court concluded that strict scrutiny does not apply when race is considered in the context of traditional redistricting principles, however, no California districts were subjected to strict scrutiny. *DeWitt*, 856 F. Supp. at 1415.

Faced with the difficulty of advocating a pure motivating factor analysis in the redistricting context, appellees ultimately retreat from that position to some extent. According to appellees (Br. 24), because "[m]embers of one race *can* * * * form a cohesive and compact community[,] * * * race may be a legitimate consideration in helping to determine the *boundaries* of a particular community." Thus, race can be a factor in determining district boundaries as long as it does not become "the touchstone for an electoral district." *Ibid.* At another point, appellees propose a slightly different formulation (Br. 34): Strict scrutiny is triggered when "the fundamental factor driving [a district] was race." As we have explained in our brief in *United States* v. *Johnson*, Nos. 94-929, 94-631 & 94-797, in addition to being too difficult to administer, a fundamental factor test is subject to the same objections as a motivating factor test: It would put politically cohesive racial minority groups at a severe disadvantage in the redistricting process, and it

would also subject most majority-minority districts to strict scrutiny.

For those reasons, both of appellees' proposed standards are inappropriate. Instead, as we have argued, when a State intentionally creates a district in which members of a politically cohesive racial minority constitute a majority, that district is not subject to strict scrutiny unless it is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting." *Shaw*, 113 S. Ct. at 2824.

In this case, there is overwhelming evidence that blacks in District 4 are politically cohesive. See U.S. Br. 29. District 4 is also not highly irregular or bizarre. U.S. Br. 22-26. Accordingly, District 4 should not have been subjected to strict scrutiny.

2. We argue in our opening brief (Br. 21) that the question whether a district is bizarre must be decided in the context of the practices of the State in which the district is created. The relevant inquiry is whether the district is bizarre when compared to other districts created through the State's traditional districting practices. Because District 4 resembles and is actually modelled on various versions of old District 8 (U.S. Br. 22), it is not bizarre within the meaning of *Shaw*.

a. Appellees do not appear to challenge our contention that the bizarreness inquiry is a comparative one. They contend instead that District 4 should be subjected to strict scrutiny because it differs from old District 8 in numerous respects (Br. 31-32). As the relevant maps demonstrate, however, the resemblance between District 4 and old District 8 is unmistakable. Both districts are located in the same general area of the State and both run in the

same general direction along the Red and Mississippi Rivers. When compared to old District 8, District 4 is not at all bizarre.

b. As we explain in our opening brief, rather than using old District 8 as the benchmark for determining whether District 4 is bizarre in the context of Louisiana districting practices, the district court undertook an inquiry that was apparently based on its own views of proper redistricting criteria. The court found that District 4 is bizarre because, in the court's view, it is not sufficiently compact, splits too many parishes and large cities, and divides various political communities. See U.S. Br. 25-26.

Appellees do not defend most of the district court's bizarreness analysis. Instead, they seek to justify the district court's finding based entirely on the evidence that District 4 splits parishes and cities. See Appellees' Br. 29-30. But as we have noted (Br. 25), there is nothing remarkable about District 4's splitting of parishes and cities. Previous Louisiana plans have split as many as seven parishes and two major cities. *Ibid.*; State's Br. 27-28 & n.33. The fact that District 4 splits 12 parishes and two major cities does not constitute a sufficient departure from prior practices to justify a finding that District 4 is bizarre.

Appellees insist (Br. 29-30) that the difference is that this time parishes and cities were divided in order to help create a majority-minority district. As we have discussed, however, there is nothing suspect about an intent to create a district in which a politically cohesive minority constitutes a majority as long as the shape of the district does not depart dramatically from the State's districting practices.

Because the minority group members in District 4 are politically cohesive and the district is not bizarre under that standard, District 4 should not have been subjected to strict scrutiny.

3. We argue in our opening brief that even assuming strict scrutiny is applicable, the State's plan satisfies that standard because it is narrowly tailored to comply with Sections 2 and 5 of the Voting Rights Act. In deciding this question, the district court inquired into whether the failure to draw a second majority-minority district would actually violate Section 2 or 5. The relevant inquiry, however, is whether the State had a firm basis for believing that District 4 may have been necessary to comply with those statutory prohibitions. Application of that standard leads to the conclusion that the State established a compelling interest sufficient to justify District 4. See U.S. Br. 27-33.

Appellees argue (Br. 35-39) that the district court's actual violation standard is the correct one for judging the constitutionality of the State's plan. But as we have noted, this Court has already rejected the view that a State seeking to comply with federal nondiscrimination requirements must prove that its actions are actually required by federal law. U.S. Br. 27-28. Instead, this Court has made clear that the State may engage in race-conscious action when it has a firm basis for believing that such action may be required by federal law. See *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989), and *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (opinion of Powell, J.). The firm basis in evidence standard (rather than a standard requiring proof that an actual violation would have occurred) is appropriate in order to encourage voluntary compliance

with federal nondiscrimination law. *Wygant*, 476 U.S. at 290-291 (O'Connor, J., concurring in part and concurring in the judgment). Appellees make no effort to reconcile their standard with *Croson* and *Wygant*.

Appellees argue (Br. 35-39) that the standard we propose immunizes constitutional violations so long as they are committed with a "pure heart." Under the standard we propose, however, a State's subjective belief that the Voting Rights Act may require a majority-minority district is not alone sufficient to justify the creation of such a district: However pure, the State's belief must also be objectively reasonable in light of the circumstances.

4. Appellees argue (Br. 39-49) that even under the standard we propose, a second majority-minority district is not justified by Section 2. As we have noted, however, the evidence shows that (1) blacks who live along the Red and Mississippi Rivers are politically cohesive, (2) whites in that area vote as a bloc against the candidates preferred by blacks, (3) the black community living along the Red and Mississippi Rivers is sufficiently large and compact to constitute a majority in a district, and (4) absent the creation of such a district, blacks would be very substantially underrepresented in the Louisiana congressional delegation when compared to their percentage in the State's population. See U.S. Br. 29-30. That evidence is sufficient to show that the State had a firm objective basis for its conclusion that a second majority-minority district was needed to comply with Section 2.

Appellees contend (Br. 46-48) that the district court's finding that the compactness requirement was not satisfied precludes any reliance on Section 2.

The district court's finding, however, was based on a subjective "eye of the beholder" test of compactness. See Appellees' Br. 47. That is not the right legal standard for judging compactness. As we have explained (Br. 29-30), the relevant inquiry is whether District 4 is reasonably compact in light of the State's traditional redistricting practices. Because District 4 is reasonably compact when compared to old District 8, it satisfies the compactness requirement. Appellees point to no evidence that would justify a different conclusion.

Appellees also contend (Br. 48-49) that there was insufficient evidence of racially polarized voting in Louisiana. But as we have shown, the evidence of polarized voting was overwhelming. See U.S. Br. 29. Appellees' assert (Br. 48) that the district court rejected the evidence presented by the United States' expert on that issue. In fact, however, the district court interrupted the examination of that expert to state that it was already convinced by his report that racial polarization existed and that further examination on that issue was therefore unnecessary. J.A. 67.

5. Appellees also argue (Br. 41) that the evidence was insufficient to justify the State's belief that a second majority-minority district was necessary to comply with Section 5. The evidence established, however, that (1) the State had impermissibly diluted minority voting strength in its 1980s congressional redistricting plan, (2) the Attorney General had objected to the State's recent Board of Elementary and Secondary Education plan on the ground that the State's failure to create a second majority-minority district reflected purposeful discrimination, and (3) the State had created majority-white districts in

prior congressional redistricting plans that were similar in compactness to District 4. See U.S. Br. 31; State's Br. 36-37. That evidence was sufficient to provide the State with a firm basis for believing that it would have difficultly satisfying its burden under Section 5 to show that its failure to create a second majority-minority district was free of discriminatory purpose.

Appellees' only response (Br. 41) is that none of the pieces of evidence noted above is sufficient by itself to prove that a plan with only one majority-minority district would have reflected purposeful discrimination. If the State had attempted to obtain preclearance for a plan with only one majority-minority district, however, each item of evidence noted above would not have been viewed in isolation. The question would have been whether the totality of the relevant facts raised an inference of purposeful discrimination. *Rogers* v. *Lodge*, 458 U.S. 613, 618 (1982). The State would, moreover, have had to shoulder the burden of proof on that issue. In those circumstances, the State's decision to comply voluntarily with Section 5 by drawing a second majority-minority district was entirely reasonable and supported by a strong basis in evidence.

6. Finally, we have argued (Br. 33-34) that the State could constitutionally draw a second majority-minority district in order to further its compelling interest in ameliorating the consequences that racially polarized voting continue to have on the opportunity for minority voters to elect candidates of their choice. Appellees contend (Br. 49) that because the district court found that the compactness requirement was not satisfied, there was no need for the court to address the State's asserted interest in

redressing the effects of racially polarized voting. As we have already discussed, however, the district court erred in concluding that the compactness requirement was not satisfied.

In addition, the assumption underlying appellees' position is that the only compelling interest that a State may assert is compliance with federal law. That assumption is incorrect. As we have explained (Br. 33-34), independent of its responsibilities under the Voting Rights Act, a State has a compelling interest in remedying the effects of racial discrimination within its borders. That interest fully justifies the State's decision to create a second majority-minority district.

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For the reasons stated in our opening brief as well as those stated herein, the district court's judgment should be reversed.

Respectfully submitted.

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Solicitor General

APRIL 1995